No. 80-1205

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ALEXANDER L. ST
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY,
Petitioner,

versus

JANET CENANCE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Under the facts of this case, is Ford Motor Credit Company a "creditor" for purposes of the Truth in Lending Act and Regulation Z of the Federal Reserve Board, and, if it is, whether it is identified as a creditor on the disclosure statement clearly, conspicuously, and in meaningful sequence as required by Regulation Z?

2. Under the facts of this case, is Ford Motor Credit Company an original creditor and, as such, liable for all disclosure violations, or a subsequent assignee and liable only for those violations apparent on the face of the disclosure statement?

3. Assuming that Ford Motor Credit Company is a creditor in this case, does Section 226.6(d) of Regulation Z relieve it of liability for disclosure violations?

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

These cases involve consumer credit disclosures made in connection with the credit sales of automobiles. The facts in the *Cenance* case are typical of the credit arrangements involved in these cases. Ms.

Cenance went to Bohn Ford, Inc. (Bohn), on April 23, 1976 and selected a used car she wanted to purchase. Ms. Cenance wanted to try to establish credit on her own but Bohn's salesman told her not to worry about applying elsewhere for credit and had her sign an application for credit (2nd Supp. R. 16). The credit application Bohn had Ms. Cenance sign was provided to Bohn by Ford Motor Credit Company (Ford Credit) (2nd Supp. R. 6-7). Bohn transmitted a copy of Ms. Cenance's credit application to Ford Credit, and a few days later Ford Credit informed Bohn that it would finance the sale (2nd Supp. R. 7). Pursuant to an agreement between Bohn and Ford Credit, Ford Credit prepared and supplied Bohn with blank forms for use in connection with making retail installment sales, which, if Ford Credit agreed were correctly filled in by Bohn, would be purchased by Ford Credit in cases in which credit applications were approved. Ms. Cenance's credit application was approved, and on April 26, 1976, she signed one of the retail installment contracts. On May 3, 1976, pursuant to its earlier commitment, Ford Credit purchased Ms. Cenance's contract from Bohn (2nd Supp. R. 8). The Truth in Lending disclosures appear on the copy of the retail installment contract given to Ms. Cenance by Bohn. At the time of this transaction, Ford Credit financed all of Bohn's credit sales in which Bohn's customers did not obtain financing on their own (2nd Supp. R. 10).

Virtually all of the terms of the credit transactions were dictated by Ford Credit. The delinquency charges,

the method of rebating the finance charge in event of prepayment, and a confession of judgment clause are examples of some of the terms and conditions of credit printed on the disclosure form by Ford Credit.

At the top of the disclosure form, Bohn is identified as the seller. Ford Credit is not identified on the form, except for the following unexecuted recital, which appears at the bottom of the form:

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.
>
> Seller Bohn Ford, Inc.
>
> By _____ Title, President

In these cases the Fifth Circuit held that Ford Credit is a creditor for Truth in Lending purposes and was not identified on the disclosure form in the way required by Regulation Z,[1] the regulation adopted by the Board of Governors of the Federal Reserve System to enforce the Truth in Lending Act.[2]

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1 12 C.F.R. §226, et seq.

2 15 U.S.C. §1601, et seq.

SUMMARY OF ARGUMENT

1.

Section 226.6(a) of Regulation Z requires that all Truth in Lending disclosures be made clearly, conspicuously and in a meaningful sequence. Where two creditors issue a joint disclosure statement, each creditor must be clearly identified. §226.6(d) of Regulation Z. Under the facts of these cases Ford Credit, the extender of credit, and the automobile dealers, the arrangers of credit, were both creditors. §226.2(s) of Regulation Z. As joint creditors, they should have both been identified on the disclosure form clearly, conspicuously, and in a meaningful sequence. But they were not identified as creditors clearly, conspicuously and in a meaningful sequence.

2.

In *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F.2d 102 (3rd Cir. 1976), the extender of credit, gave the consumer a disclosure statement but the arranger of credit, the automobile seller, failed to make any disclosure. The court held that the seller violated §226.6(d) of Regulation Z. *Manning*, however, did not involve a joint disclosure statement. *Manning* did not hold that where two creditors give a joint disclosure statement to a consumer only one of them can be held liable for disclosure violations.

3.

Any conflicts that may have been created between the circuits by the decision in these cases have been

completely resolved by the changes made in disclosure requirements under the regulations of the Truth in Lending Simplification and Reform Act, which creditors can use beginning on April 1, 1981.

ARGUMENT

I.

The Decision Of The Fifth Circuit In These Cases Rests On Consideration Of Issues Not Raised In The Decisions Of The Three Other Circuits And The Official Staff Interpretation Of The Federal Reserve Board On The Creditor Identification Issue.

In its petition for a writ of certiorari, as it has in each Truth in Lending case in which it was a named defendant, Ford Motor Credit Company asserts that it was a "subsequent assignee", not a "creditor" in these cases. See Ford Credit's Pet. 9-10 and 19-26. This contention, which respondents submit is the real reason why Ford Credit is urging this court to issue the writ, has been rejected by every court that has considered it.[3] In

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3 *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511 (5th Cir. 1976), cert. denied, 431 U.S. 929 (1977); *Mirabal v. General Motors Acceptance Corporation*, 537 F.2d 871, 874 n. 1 (7th Cir. 1976); *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 91-92 (8th Cir. 1976); *Whitlock v. Midwest Acceptance Corp.*, 575 F.2d 652 (8th Cir. 1978); *Price v. Franklin Investment Company, Inc.*, 574 F.2d 594, 599-601 (D.C. Cir. 1977); *Ljepava v. M.L.S.C. Properties, Inc.*, 511 F.2d 935, 942 (9th Cir. 1975); *Lauletta v. Valley Buick, Inc.*, 421 F.Supp. 1034, 1036 (W.D. Pa. 1976).

fact, the decisions of the Sixth, Seventh, and Ninth Circuits, which Ford Credit says conflict with the decision in these cases, are predicated on the assumption that Ford Credit is a creditor, not a subsequent assignee. See *Augusta v. Marshall Motor Co.*, 614 F.2d 1085, 1086 (6th Cir. 1979); *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423, 426 (7th Cir. 1980); *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753, 756 (9th Cir. 1978), rev'd on other grounds, *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980).

The decisions are also based on the finding that to be clearly identified as a "creditor" on the disclosure statement, as required by Regulation Z, the word "creditor" need not be used. In *Milhollin v. Ford Motor Credit Company*, 588 F.2d 753, 757 (9th Cir. 1978), rev'd on other grounds, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), the Ninth Circuit said:

> Nowhere does Regulation Z require use of the word "creditor". Here, the exact role that Ford Credit ultimately played in each transaction was clearly disclosed. Requiring Ford Credit to use the word "creditor" would not have given Consumers additional information nor better served the purposes of the Act.

In *Sharp v. Ford Motor Credit Company*, 615 F.2d 423-426 (7th Cir. 1980), the Seventh Circuit said:

> "[N]either the statute nor the regulations require that a creditor's identity be disclosed in a

particular manner or be denominated by the specific and descriptive appellation of creditor."

These decisions follow an official staff interpretation of Regulation Z, which says that: "[a]lthough the identification of a creditor is a required disclosure under §226.8(a), the disclosure does not constitute required 'terminology.' " Federal Reserve Board Official Staff Interpretation No. FD-0001, 41 Fed. Reg. 41908 (1976).

But the result reached in these cases is distinguishable from the result reached by the Sixth, Seventh and Ninth Circuits, as well as the result reached in Federal Reserve Board Official Staff Interpretation. The respondents in these cases *never* contended that Ford Credit's identity as a creditor on the disclosure statement was inadequate because the word "creditor" was not used. Respondents in these cases asserted that the placement as well as the technical, legalistic wording of the only sentence on the disclosure statement in which Ford Credit is mentioned violates Regulation Z's requirements that in multiple creditor cases each creditor must be identified, and that this disclosure, like all others, must be made clearly, conspicuously, and in meaningful sequence.[4]

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4 §226.6(a) of Regulation Z requires that all disclosures to be made "clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, at the time and in the terminology prescribed in applicable sections."

Under §226.6(d) of Regulation Z in transactions in which multiple creditors make a joint disclosure, each creditor must be clearly identified.

The disclosure form given Ms. Cenance serves as a good example of disclosure violations alleged by respondents. At the top of Ms. Cenance's disclosure statement the name and address of Bohn, the seller, is disclosed. Bohn is the arranger of credit and under §226.2(s) of Regulation Z is a creditor. Ms. Cenance had no quarrel with the way Bohn was identified, even though the word "creditor" was not used to identify Bohn.

Ford Credit's name appears on the bottom of the form, in the following sentence:

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the assignment set forth on the reverse side hereof.

At best, this language only tells the consumer that Ford Credit will in the future become an assignee. As the district court said, "[t]his obviously refers to Ford only as a potential assignee, and the assignment was, of course, to be executed only at some time after the plaintiff signed the form." 430 F.Supp., at 1068 (footnote omitted). This disclosure simply does not inform the consumer that Ford Credit had already agreed to extend credit in the transaction, and, for Truth in Lending purposes, was a creditor in the transaction at the moment the contract was signed.

Further, the highly technical, legalistic wording of the sentence does not clearly inform the consumer that Ford Credit is the extender of credit in the transaction. While it is true that no specific language is required by Regulation Z to clearly identify the creditors, legalese of the type used on the disclosure statement given to respondents does not pass muster.

Finally, if the requirement of §226.6(a) of Regulation Z that all disclosures be made clearly, conspicuously, and in meaningful sequence has any meaning it must mean that in multiple creditor transactions the creditors must be identified together, in the same section of the disclosure statement. Where one creditor is identified at the top of the disclosure statement and the other is only identified in the midst of the technical, legal, assignment statement, it cannot be said that both creditors were identified clearly, conspicuously and in a meaningful sequence.

The above issues were raised and correctly decided by the Fifth Circuit in these cases. The decisions of the Sixth, Seventh, and Ninth Circuits that petitioner says conflict with these cases did not address or decide these issues. In short, the fact that respondents have never claimed that the failure to use the word "creditor" was a disclosure violation distinguished these cases from the cases in the Third, Seventh, and Tenth Circuits, as well as the official staff interpretation of Regulation Z issued by the Federal Reserve Board. The results reached by the Fifth Circuit in these cases are based on issues

not considered by the staff opinion letter and the other circuit decisions.

II.

Because These Cases Involve A Joint Disclosure Statement, Which Was Prepared By Ford Credit, The Result Is Distinguishable From The Result Reached By The Second Circuit In *Manning v. Princeton Consumer Discount Co., Inc.*

The facts in these cases mandate a different result than that reached in *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F.2d 102 (3rd Cir. 1976), In these cases the automobile seller, the arranger of credit, and Ford Credit, the extender of credit, submitted a joint disclosure statement to the respondents. In *Manning* the extender of credit submitted to the consumer the disclosures required in credit loan transactions.

In *Manning* the automobile seller, the arranger of credit, failed to make any disclosures. 533 F.2d 104. The court held that under those facts the extender of credit did not have to make the credit sales disclosures. 533 F.2d 105.

The court in *Manning* did not hold that in cases like these, where two creditors — the arranger of credit and the extender of credit — make a joint disclosure, only one, the arranger of credit, can be liable for disclosure violations. Yet this incongruous result is exactly what petitioner would have this court adopt in place of the

Fifth Circuit's well reasoned opinion in these cases, The holding in *Manning*, even if correct, would be wholly inappropriate to the facts of these cases.

Further, the *Manning* decision has been so widely repudiated and distinguished that it is of little or no value as precedent. See *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1977); *Hinkle v. Rock Springs National Bank*, 538 F.2d 295 (10th Cir. 1976); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976); *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976); *Williams v. Bill Watson Ford, Inc.*, 423 F.Supp. 345 (E.D. La. 1976).

III.

The Truth In Lending Simplification And Reform Act And The Implementation Regulations Completely Resolves Any Existing Conflict Between The Circuits.

Assuming that there is a conflict in the circuits on either the use of the word "creditor" or the liability of an extender of credit in credit sale transactions, any such conflicts have been resolved by the Truth in Lending Simplification and Reform Act (Simplification Act), which is Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, P.L. No. 96-221, 94 Stat. 132. This act *changed* the definition of creditor. Under §602(a)(1) of the Simplification Act a creditor is now defined as "the person to whom the

debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness." Implementing regulations for the Simplification Act must be in place by April 1, 1981. Between April 1, 1981 and April 1, 1982, the date the revised regulations become mandatory, creditors may comply with either the old or the revised regulation. See the Annual Report to Congress for the year 1980 on Truth in Lending, Board of Governors of the Federal Reserve System.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

April ____, 1981.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the below listed counsel of record each have been served with three copies of the enclosed brief by depositing the briefs in the United States mail on the ____ day of April, 1981, in a postage-paid envelope and addressing the envelope to the counsel listed.

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